IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr. Appeals No. 72 & 271 of 1993

Judgment reserved on 26.11.2007

Date of decision: 10.12.2007

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1. **Cr.Appeal No.72 of 1993**

Pawan Kumar & another **…….Appellants**

Versus

State of H.P. …..Respondent

For the appellants Mr. Vinay Thakur, Advocate, vice Mr T.R.Chandel, Advocate,

For the respondent Mr Som Dutt Vasudeva, Addl. Advocate General, with Mr D.S.Nainta, Deputy Advocate General.

2. **Cr. Appeal No. 271 of 1993**

State of H.P …….. Appellant

Versus

Pawan Kumar & others **…….Respondents.**

For the appellant Mr Som Dutt Vasudeva, Addl. Advocate General, with Mr D.S.Nainta, Deputy Advocate General

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For the respondents Mr. Vinay Thakur, Advocate, vice Mr T. R. Chandel, Advocate

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Coram

Hon'ble Mr. Justice Surjit Singh, J.

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting[1]? yes

Surinder Singh, J.

Appellants herein and their mother Hardei were acquitted of the charge of murder under section 302 of the Indian Penal Code but only the appellants Pawan Kumar and Prabhat Singh were convicted under section 304 part (II) read with section 34 of the Indian Penal Code, accordingly each

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Whether reporters of the Local papers are allowed to see the judgment? yes

of them was sentenced to undergo rigorous imprisonment, for a period of four years, and to pay a fine of Rs.2,000/-. In default of payment of fine to further undergo rigorous imprisonment for six months, for allegedly causing death of Pardeep Kumar (deceased) son of the complainant Mehar Singh.

The aforesaid judgment of conviction and sentence has been assailed by the appellants. The State also felt aggrieved by their acquittal under section 302 of The Indian Penal Code thus filed appeal No.271 of 1993 to set aside the acquittal of the appellants , contending that the evidence on record proves the charge of murder against them.

The prosecution case in brief can be stated thus:

Admitted facts.

Bakshi Ram, father of the deceased, was recorded as owner in possession of the land comprising Khasra No.220/80 situated in ***Tikka Khuhe-ki-Bhoon*** which is recorded as '**gair mumkin Khad**" in the revenue records. Bakshi Ram aforesaid had filed a suit for injunction, with respect to this land, in the court of Sub Judge, Hamirpur, against the complainant Mehar Singh (father of the deceased), which was decreed. An appeal was filed by the complainant Mehar Singh in the court of District Judge, Hamirpur on 26.2.1992 and obtained the status quo stay.

MOTIVE

As per the case of the prosecution, the appellants were impressing upon the deceased Pardeep Kumar to withdraw the appeal or to face the consequences.

PROSECUTION CASE

It is alleged that on 2.3.1992 Kuldip Kumar son of the complainant was suffering from a mild temperature. Around 4.30 p.m. he left for a nearby village Kaloor, to get the medicine from the medical practitioner. After about 5-7 minutes of his departure, complainant Mehar Singh and Pardeep Kumar (deceased) heard the cries of Kuldip Kumar,

both of them went to the spot and saw that the appellants were giving fist blows to Kuldip Kumar. Mehar Singh inquired about the reasons for beating up Kuldip Kumar; the appellants told him that the appeal before District Jude was not withdrawn, therefore, they would not leave them to survive. The complainant and deceased, both intervened to relieve Kuldip Kumar from their clutches but Pawn Kumar gave stone blow on the left side of the waist of Pardeep Kumar. Thereafter, Prabhat Singh appellant gave a danda blow almost near the same place to Pardeep Kumar and he fell down. Both of them also gave kicks and fist blows to him, Kuldip Kumar and Mehar Singh complainant, whereas their mother Hardei, who was present there, instigated the appellants to kill the complainant party and told them that she would get them released. The complainant raised an alarm, on this Surti Ram (PW14), Sher Singh (PW15), Khushi Ram, Ashok Kumar, Gian Chand (PW12) and Sarwan Kumar reached there. On seeing them, the appellants and their mother ran away from the spot. Pardeep Kumar, was lying unconscious on the spot, he was taken to hospital at Nadaun by Gian Chand and Sarwan Kumar, whereas his father Mehar Singh went to the Police Station, and lodged FIR Ex.PD under section 307 read with section 34 of the Indian Penal Code. Puran Chand ASI visited the hospital where Pardeep Kumar was being given treatment but he was unable to give any statement and succumbed to his injuries about 6.30 p.m.

The police prepared the inquest report Ex. PR. Dead body of the Pardeep Kumar was sent for autopsy to the District Hospital, Hamirpur. In the opinion of the Doctor, the deceased had died due to shock leading to cardio-respiratory arrest due to the internal injury with hemorrhage in peritoneum cavity. All injuries were ante-mortem and the injury on the body of the deceased were opined to be sufficient in ordinary course of nature to cause death. The case was converted into one punishable under section 302 read with section 34 of the Indian Penal Code against the appellants

and under section 302 read with section 109 of the Indian Penal Code against Hardei.

The appellants were arrested and medically examined. The medico-legal-certificate of Kuldip Kumar is Ex.PN. He was having the following injuries on his person, as observed by Dr. Savitri (PW8):

1) There was slight swelling on left upper arm. There was no discolor of skin, underlying structures were normal.
2) Slight swelling of mid thigh on back side. No discoloration of the skin and underlying structures were normal.

Accused Pawan Kumar was also examined, his medico-legal-certificate is Ex. PK. He had sustained the following injuries:

1) Abrasion ® lower leg. On lateral aspect 1½ " long 2mm wide. Reddish brown in color.
2) c/o Pain ® little finger, clinically NAD
3) Abrasion on (l) shoulder – 3mm x 3mm –reddish brown in color.

Vide their disclosure statements, recorded under section 27 of the Indian Evidence Act, the appellant Prabhat Singh got recovered the Danda vide recovery memo Ex. PF and Pawan Kumar got recovered stone vide recovery memo Ex. PG. Police also took the photographs of the dead body and prepared the site plan.

After completing the investigation, case was presented in the court for trial against the appellants, under the aforesaid sections. They were charge sheeted. They pleaded not guilty and claimed trial.

In order to prove the case, the prosecution examined its witnesses.

Appellants were also examined under section 313 of the Code of Criminal Procedure.

The appellants raised the defence that on 2.3.1992 at about 4.30 p.m., they were cutting the grass in their land comprised in Khasra No.80 in Khadli; Pardeep Kumar (deceased), his brother Kuldip Singh (PW) and father Mehar Singh (PW2) came there to take forcible possession of the land aforesaid, which was under litigation ,with them. The complainant party attacked upon them and there had been a scuffle between all of them and during that scuffle, Pawan Kumar (appellant) and Kuldip Kumar (PW 13) fell down. Thereafter they went to their respective houses. Further according to the convict-appellants the complainant party sustained the injuries in the scuffle when they had fallen down.

The appellants were called upon to enter into their defence. The appellants examined Patwari Shri Ilam Din (DW-1) , Des Raj (DW2) Moharrar of Police Station Jawalamukhi to prove the FIR No.22 of 1990 dated 12.3.1990 under sections 451, 323, 506 and 147 of the Indian Penal Code registered about two years prior to the alleged incident. Ram Singh (DW3) the then Pardhan of Gram Panchayat Amlehar was also examined to prove that Bakshi Ram, father of the appellants, had filed applications Ex.D-4 and Ex.D-5 before him, the copies of which bears his signatures. The appellants also tendered in evidence copy of order (Ex.D6) dated 16.3.1991, passed on application under order 39 Rule 1 and 2 C.P.C. by the Sub Judge (II), Hamirpur. Further the Court examined Bhag Singh (C.W.1) Pradhan, Gram Panchayat, Amlehar.

On 26.5.1993 the trial court also inspected the spot. The report is placed on record, along with Tatima Mark “X”.

After going through the entire record and appreciating the evidence of the parties, the learned trial court acquitted accused Hardei, mother of the convict-appellants but convicted the appellants, as aforesaid, which has been assailed in these appeals, as stated above..

SUBMISSIONS BEFORE US

Shri Vinay Thakur, learned counsel for the appellants has vehemently argued that the appellants were aggressors and the appellants exercised their right of private defence. The appellants Pawan and Kuldip Kumar injured witness sustained the injuries in a scuffle and deceased also fell down on the uneven surface in the scuffle and sustained fatal injury. The appellants have probablised their defence, therefore, their conviction is erroneous and deserves to be set aside.

Contra, Shri S.D.Vasudeva, learned Additional Advocate General has argued that in the opinion of the Doctor the fatal injury sustained by Pardeep Kumar was sufficient, in the ordinary course of nature, to cause death. The fatal injury was inflicted by accused Pawan Kumar with the stone Ex.P-2 and at the same time a danda blow was given by his brother Prabhat at the same place. The defence raised is not borne out from the record. There is overwhelming evidence on record to show that the appellants had a strong motive to commit the murder, therefore, it was a case under section 302 of the Indian Penal Code and the learned trial court erred in holding them guilty of the offence under section 304 (Part II) of the Indian Penal Code. Therefore, prayed to convert the conviction of the appellants to that of section 302 read with Section 34 of the Indian Penal Code and set aside the acquittal of Hardei and to punish her in accordance with law.

We have given our thoughtful consideration to the rival contentions of the learned counsel for the parties and have carefully gone through the evidence on record.

OUR FINDINGS AND REASONS THEREFOR.

It is an admitted fact that Khasra No.220/80 which was gair-mumkin Khad was under civil litigation inter-se the parties. Father of the appellants got a decree of injunction land referred above, in his favour and against

Mehar Singh whereas; it was assailed in appeal before the District Judge by Mehar Singh (PW2) father of the deceased, wherein he got **status quo** stay. According to Kuldip Singh (PW13), the appellants have been threatened to withdraw the appeal lest they should be ready to die. On 2.3.1992 he was running mild temperature, his father PW2 told him to go to a private Doctor for taking medicine, when he was on his way and hardly had he covered a distance of 150 yards from his house, appellants and their mother Hardei met him on the way, Pawan Kumar appellant gave him a push on his shoulder, when the witness protested then appellant dragged him and gave beatings by fists and kick blows. The witness cried for help, on hearing his cries his brother Pardeep Kumar and father Mehar Singh came for his help. On reaching there, Mehar Singh asked from the appellants as to why they were giving beatings to Kuldip Singh. Appellants replied that since the appeal was not withdrawn, they would kill all of them. It is deposed by Kuldip Singh that his brother Pardeep intervened to rescue Kuldip Singh from the clutches of the appellants. Pawan Kumar give him a blow of stone on his left side of the waist, his brother Pradeep put both his hands on that place where he got injury by the stone, in the meantime Parbhat Kumar appellant gave him danda blow on the back of his brother, as a result of which he fell down and thereafter appellants started giving kick and fist blows to Pardeep, when his father intervened he was also given kick and fist blows. On raising cries by Kuldip, Surti Ram, Ashok Kumar, Khushi Ram and Sher Singh came there and due to their intervention they were saved from the clutches of the appellants. This version of (PW13) is duly supported by Mehar Singh (PW2), Surti Ram (PW14), Sher Singh (PW15) and Gian Chand (PW12).

In the cross-examination of the above witnesses, the appellants have denied the occurrence, as alleged and the case of the appellants that the complainant party had tried to forcibly enter their

disputed land. Both PW13 Kuldip and his father (PW2) have denied the suggestion that they along with their deceased brother had sustained injuries in scuffle.

Post mortem report Ex.PM reveals the following injuries on the dead body of the deceased:

1. There was an abrasion of the size of ½ " below the chin of dark brown colour
2. Multiple small abrasions on the right side of face, nose and mandibular area and neck;
3. Multiple abrasions of dark brown contusion on the posterior aspect of left forearm in the middle third size of abrasions is 1", 1½". 1", ¾ " 1" and ½ "
4. There was contusion over anterior aspect of left forearm, brown colour with swelling in the upper one third region;
5. Contusion on the left side of the chest lower part in the posterior axillary line, size of contusion was 3" x ½ " with central area place and margins brown in colour.

INTERNAL INJURIES

1. Abodemen

Peritoneum congested whole of peritoneum cavity was full of hemorrhagic fluid. There was about two liters of fluid in the peritoneum cavity. Mesentary and the small intestine in left flank was having haemetoma posteriority there was small laceration of mesentery of size ½ " X ½ " peritoneum cavity full haemorragic fluid.

In the opinion of the Doctor the deceased died due to shock leading to cardio-respiratory arrest caused by internal injury (mesenteric) with hemorrhage in peritoneum cavity and all the injuries were ante-mortem. The probable time between the injury and death was 6-

8 hours. **The Doctor further opined that injury No.5 i.e. external injury on the left side of the chest could be caused by a stone Ex.P2 and internal injury found in the abdomen was the direct and natural consequence of the said injury. The aforesaid internal injuries were sufficient in the ordinary course of nature to cause the death of Pardeep Kumar (deceased).** In the cross-examination the Doctor has admitted that there were only two contusions on the body of the deceased and remaining were abrasions insofar as external injuries are concerned and the left side of the waist is a vital part of the body.

According to Bachitar Singh (PW3), appellant Prabhat Singh made a disclosure statement regarding the Danda and he got recovered a bamboo danda, 4'-8" long having 5" girth was taken into possession by the police vide recovery memo Ex.PF from the spot. The witness has denied that the place of recovery was accessible to all because there was no common path adjoining to that place.

Bidhi Chand (PW4) has proved the disclosure statement (EX.PG) of Pawan Kumar, regarding recovery of stone. Pursuant to this said Pawan Kumar got recovered the stone (1½ k.g.) Ex.PG/2 vide recovery memo Ex.PG/1.

As already stated above, the appellants had led the defence evidence and proved earlier FIR 22 of 1990 (Ex.D-3) dated 12.3.1990 under sections 451, 323, 506 and 147 of the Indian Penal Code, registered with the police station, Jawalamukhi. In order to show the enmity the appellants examined Ram Singh (DW3), Pardhan of the Gram Panchayat, Amlehar, who stated that the Bakshi Ram had filed applications Ex.D-4 andD-5 in the year 1991 against the appellants. According to Bhag Singh (C.W.1) Pradhan, Gram Panchayat Amlehar, original copies of the Ex.D-4 andD-5 were not available in the records of the Gram Panchayat.

In order to appreciate the evidence of the parties, the trial court had also visited the spot on 24.5.1993 and recorded the spot inspection note. The concerned Patwari was directed to place on record the Akas Tatima. Akas Tatima mark "X" was got prepared with respect of three villages adjacent to Khasra No.358 in village Mon Ghat, where the alleged occurrence had taken place as well as Khasra No.220/80 of village Khuhe-ke-Bhoon. The spot was inspected by the learned Sessions Judge in the presence of learned Public Prosecutor and learned defence counsel. The spot inspection report reads as under:

> " I have inspected the spot in presence of Sh.J.R.Chhabra, Public Prosecutor for the State and Sh. B.S.Dhari, learned defence counsel and the respectable of the villages. The Patwari Halqua Sh. Shakti Chand is also present. Mehar Singh Complainant and Bakshi Ram father of the accused are also present. Sh. Karnail Singh S.I./S.H.O. Police Station Nadaun is also present.
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> The Patwari has shown me Khasra No.358 in village Mon-ghat and the S.H.O. has shown the spot of occurrence. Though the whole Khasra No.358 is owned by private persons and there is no public path in the revenue records, but there exists a public path on the southern portion of Khasra No.358. Thereafter, the land of village Farnah at situates, whereas a khad is going along the land of village Farnahjat which khad falls in village Khuhe-ke-Bhoon. Since the Patwari has only brought the revenue records qua the land of Khasra No.358 of village Mon Ghat and has not produced the records

> of village Farnahjat and Khuhe-ke-Bhoon. He is directed to show me the latha of these villages also, especially with the record of adjoining land of village Farnahat to Khasra No.358 and Khasra No.220/80 and Khasra No.1 of village Khuhe-ke-Bhoon. He is directed to produce the records of other villages also before me on 26.5.93 at 1 p.m.
>
> Sd/
> Sessions Judge
> 24.5.93 "

Pursuant to the above direction, the **Tatima mark "X"** was obtained. On the perusal of the aforesaid inspection note,and the statements of the injured witnesses, it is apparent that the Kuldip (PW13) was way laid in Khasra No.358 and not in Khasra No. 220/80 which fell in another tikka i.e. Khuhe-ke-Bhoon. **The boundaries of these khasra numbers do not abut each other.** As already stated above Kh.No.220/80 is **gair mumkin khad.** The defence taken by the appellants that they were cutting the grass in their said Khasra Number on that day and the complainant party came there to forcibly occupy the same is not borne out from the evidence on record, so as to probablised their plea of private defence, because the place occurrence is altogether different from the land alleged to be claimed by the appellants. Otherwise also if the accused leaves the land/property, their right of private defense to this property is ceased to exist.

We may state that the standard of proof in the case of a defence plea including the plea that the case of the appellants is covered by any of the General Exceptions in the Indian Penal Code is not the same as is required for holding an accused guilty of the charge. For holding a person guilty of a charge, rule of strict proof is applicable, that is to say, the burden of proof is on the prosecution to prove the charge beyond reasonable doubt. In the case of a defence plea, including the plea that the case is covered

by any of the General Exceptions in the Indian Penal Code, the principle of preponderance of probabilities is applicable. However, burden of proving the existence of circumstances brining the case within any of the General Exceptions in the Indian Penal Code or within any Special Exception or proviso contained in other part of the same code or in any law defining the defence, is upon the accused and the court shall presume the absence of such circumstances, but there is a beed-rule of judicial precedents that in the case of proof of a defence plea or the plea that the case is covered by the General Exceptions or any other Exceptions, the principle of preponderance of probabilities and not the rule of strict proof applies and that the accused can show by reference to the circumstances transpiring from prosecution's own evidence that his case is covered by any of the Exceptions under the Indian Penal Code or any other penal law. As already held by us in Criminal Appeal No.142 of 1992 titled as ***State of H.P. versus Piare Lal*** decided on 14.11.2007***.***

it is specifically and unequivocally stated by the prosecution witnesses, discussed above, that Pawan Kumar had hit on the left side of the waist of deceased, Pardeep Kumar by the stone which has caused a fatal injury to him and Prabhat Singh had caused a **danda** blow on the same place and in the opinion of the Doctor this injury has caused immense damage inside to Mesenteric, which has caused death of Pardeep Kumar.

As already stated above in the instant case, the defence plea is not probablised at all. The learned trial court has convicted the appellants under section 304 part (II) read with section 34 of the Indian Penal Code, as aforesaid, but in our considered opinion it is a case of voluntarily causing grievous hurt to Pardeep Kumar by the appellants, which resulted in his death by stone and danda (which cannot be termed as the

dangerous weapons) punishable under section 325 read with section 34 of the Indian Penal Code.

Accordingly, we convert the conviction of the appellants under section 325 of the Indian Penal Code from that of Section 304 part (II) read with section 34 of the Indian Penal Code, whereas in our opinion the acquittal of accused Hardei, from the circumstances on record, is justifiable, therefore, it is upheld. We also do not find anything in the appeal of the State to hold the appellants guilty of the offence under section 302 of the Indian Penal Code. Thus both the appeals are dismissed.

THEREFORE, FOR THE REASONS STATED ABOVE in Cr. Appeal No. 72 of 1993 we hold the appellants guilty of the offence punishable, under section 325 read with section 34 of the Indian Penal Code. The convict-appellants were arrested on 3.3.1992 in this case. Since then they remained in custody. Vide orders dated 31.5.1993 passed by this court, their sentence was suspended till the final disposal of their appeal. Therefore, the custodial sentence of the appellant-convicts is reduced to already undergone from four years as awarded by the trial court. However, we maintain the fine already imposed by the trial court. In addition, the appellants shall also pay Rs.10,000/- each as compensation to the legal heirs of the deceased, as per their entitlement under the Succession Act.

Both the appeals are accordingly disposed of.

(Surjit Singh),J.

December 10 ,2007 (Surinder Singh),J.
(D)